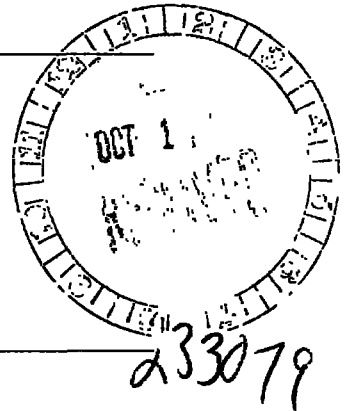


**Before the
Surface Transportation Board**

Finance Docket No. 35638

**NEW JERSEY TRANSIT CORPORATION
- ACQUISITION EXEMPTION -
NORFOLK SOUTHERN RAILWAY COMPANY
IN THE COUNTY OF ESSEX, NEW JERSEY**



**MOTION OF
NEW JERSEY TRANSIT CORPORATION
TO DISMISS THE NOTICE OF EXEMPTION**

Dated: October 1, 2012

Communications with respect to this document
should be addressed to:

**ENTERED
Office of Proceedings**

OCT 01 2012

**Part of
Public Record**

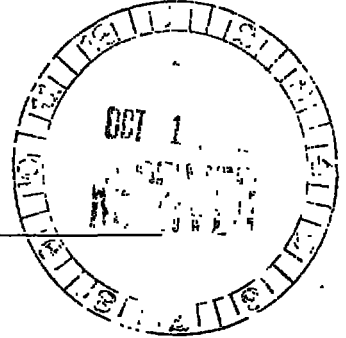
Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 955-5600
E-mail: cspitulnik@kaplankirsch.com
epilsk@kaplankirsch.com
afultz@kaplankirsch.com

Counsel for New Jersey Transit Corporation

**Before the
Surface Transportation Board**

Finance Docket No. 35638

**NEW JERSEY TRANSIT CORPORATION
– ACQUISITION EXEMPTION –
NORFOLK SOUTHERN RAILWAY COMPANY
IN THE COUNTY OF ESSEX, NEW JERSEY**



**MOTION OF
NEW JERSEY TRANSIT CORPORATION
TO DISMISS THE NOTICE OF EXEMPTION**

The New Jersey Transit Corporation (“NJ Transit”) intends to acquire from Norfolk Southern Railway Company (“NSR”) a 1.3 mile portion of the line of railroad commonly known as the “Orange Industrial Track” located in Essex County, New Jersey, in order to ensure continued access to the Newark City Subway Vehicle Base Facility to support NJ Transit’s light rail operation. NJ Transit and NSR have completed negotiations for the terms and conditions of the transfer. NJ Transit will acquire the real property underlying the Orange Industrial Track from MP 8.616 to MP 9.905 (the “Line”). NJ Transit is today filing a Notice of Exemption (“NOE”) in this proceeding with respect to that proposed transaction. NSR will retain the exclusive freight rights and obligations over the Line, *see* Quitclaim Deed, a copy of which is attached to the NOE as Exhibit 4. The Second Operating Agreement for the Orange Industrial Track between NJ Transit and NSR assures that NSR can continue to fulfill any rail freight needs that exist. A copy of the executed Second Operating Agreement for the Orange Industrial Track is attached to the NOE as Exhibit 5.

Because NJ Transit will not acquire any rights or obligations that implicate the existing freight common carrier operations for the property covered by the NOE, the transaction between NJ Transit and NSR is not subject to the jurisdiction of the Board. NJ Transit's ownership of the Line will not interfere with or in any way impair NSR's ability to provide freight rail service on the Line or on the remainder of the Orange Industrial Track. NJ Transit therefore seeks a determination pursuant to *State of Maine, DOT – Acquisition and Operation Exemption – Maine Central R.R. Co.*, 8 I.C.C. 2d 835 (1991) ("*State of Maine*") and related Board decisional law that NJ Transit's acquisition of the physical assets of a portion of the Orange Industrial Track, including fee title subject to the reservation of a freight easement in NSR, does not require Board authorization under 49 U.S.C. § 10901. Accordingly, NJ Transit's NOE in this proceeding should be dismissed.

I. FACTS

NJ Transit is an instrumentality of the State of New Jersey that provides mass transportation services throughout New Jersey, including service on a number of light rail and commuter rail lines. New Jersey Statutes Annotated 27:25-1 *et seq.* NJ Transit and NSR have completed the negotiation of a set of agreements to allow the exchange of certain rail lines. Specifically, pursuant to the Exchange Agreement, a copy of which is attached to the NOE as Exhibit 3, (1) NJ Transit will transfer to NSR a portion of a rail line known as the "Secaucus Track" from Milepost 4.02 to Milepost 4.980, in Hudson County, New Jersey¹, and (2) NSR will transfer the Line to NJ Transit. NJ Transit will acquire the Line in order to ensure continued access to the Newark City Subway Vehicle Base Facility, which is used for the maintenance of NJ Transit light rail equipment. A map of the Line is shown on Exhibit 1 to the NOE.

¹ As set forth in the attached Verified Statement of M. David Gooden, NSR asserts that the Secaucus Track is adjacent to NSR's Croxton Yard and is properly classified as industrial lead track. Accordingly, NSR states, approval from the STB for acquisition of this track by NSR is not necessary.

Concurrently with the Exchange Agreement, NSR has issued a Quitclaim Deed to NJ Transit transferring to NJ Transit NSR's interests in the tracks, land and other rail property of the Line, *except that* NSR will retain an "exclusive, perpetual, transferable, assignable and irrevocable retained rail freight rights" on the Line, as set forth in the Quitclaim Deed. The Quitclaim Deed further provides that

NJ Transit acknowledges [NSR's] retained rights, and that NJ Transit neither has nor will have any right to serve existing or future rail shippers, and will make no attempt to construct additional sidings to serve such shippers for its own account or to circumvent this agreement by other means directly or indirectly.

Accordingly, NSR's current rail freight rights will not be affected by the transfer and NJ Transit is not acquiring any such rights or obligations. A copy of the Quitclaim Deed is attached to the NOE as Exhibit 4. The Quitclaim Deed and related transaction documents have been placed in escrow pending the conclusion of the exempt notice proceeding.

NSR and NJ Transit have also executed the Second Operating Agreement for the Orange Industrial Track, a copy of which is attached to the NOE as Exhibit 5. The Second Operating Agreement makes clear that operations on the Line will be subject to the Trackage Rights Agreement entered into between Consolidated Rail Corporation and NJ Transit, effective as of October 1, 1984, and to which NSR is bound as successor-in-interest to Consolidated Rail Corporation. *See CSX Corp.—Control and Operating Leases/Agreements—Conrail Inc.*, 3 S.T.B. 196 (1998).²

NJ Transit has acquired no right to operate freight service on the Line, will acquire none, and is prevented from using any portion of the trackage for freight rail purposes pursuant to the

²The Trackage Rights Agreement delineated the operating rights of NJ Transit and Consolidated Rail Corporation on each others' tracks. Consolidated Rail Corporation retained an easement for its freight operations on certain NJ Transit owned tracks. "Category NF Rail Properties" are owned by NJ Transit and used for freight operations only and are not used for passenger operations. "Category NFP Properties" are owned by NJ Transit and used for both passenger and freight operations. See Exhibits 2 and 3 to the NOE.

terms and conditions of its agreements with NSR. Furthermore, NJ Transit is authorized by statute to operate mass transportation services only and cannot lawfully conduct freight operations. The Quitclaim Deed specifically provides that NSR will retain an exclusive easement over the Orange Industrial Track as shown in Exhibit 1 to the NOE for the purpose of fulfilling its rights as a common carrier freight railroad. See Verified Statement of M. David Gooden, attached hereto as Exhibit A, discussing the current operations on the Orange Industrial Track.

II. DISCUSSION

The agreements attached to the NOE confirm that NJ Transit is acquiring none of the rights and obligations to provide freight service on the Orange Industrial Track. NSR will retain the sole right to provide that service, and NJ Transit will not be able to interfere with NSR's ability to fulfill its common carrier obligations on the Line or on the remainder of the Orange Industrial Track. The NOE should be dismissed because the transaction does not involve the transfer of any rights that would implicate this Board's jurisdiction.³

A. Application of *State of Maine*

This Board has consistently determined that it need not authorize a transaction involving the sale of a line of railroad when the buyer has no intention or ability to assume freight operation and is not acquiring assets or rights that would "disenable . . . [the seller] from meeting its common carrier obligation." *State of Maine*, 8 I.C.C. 2d at 837. Citing *State of Maine*, this Board has reiterated that "[o]ur authorization is not required . . . when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred." *Utah Transit Authority – Acquisition Exemption – Certain Assets of Union Pacific R. Co.*, STB Finance Docket No. 34170, slip op. at 2 (Service Date May 22, 2002). A basic requirement of such cases is that the selling freight railroad retain a permanent easement that

³ See Footnote 1 concerning the Secaucus Track.

permits it to continue to provide common carrier freight service. *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*, STB Finance Docket No. 35128, slip op. at 3 (Service Date Oct. 27, 2008). Beyond that, the relevant inquiry is whether the freight railroad has sufficient property and contract rights to conduct freight operations, and whether the line's new owner has the right or ability to materially or unreasonably interfere with the railroad's freight operations. See, e.g., *Metro Regional Transit Auth. – Acquisition Exemption – CSX Transportation, Inc.*, STB Finance Docket No. 33838, slip op. at 4 (Service Date Oct. 10, 2003).

The Board recently addressed how *State of Maine* and its progeny have been applied in the context of shared freight and commuter use, where a state agency acquires a rail line from a freight railroad and the line will be used for both continuing freight service and for new commuter or passenger rail service:

To balance the development of mass transit with the retention of freight rail service, the freight carrier need not necessarily retain full control. Instead, the Board examines in each case whether the agreements between the parties continue to give the freight carrier the ability to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.

While the freight carrier must continue to have a permanent easement or its equivalent to provide freight service, the public agency acquiring the right-of-way and track may negotiate terms and conditions with the freight carrier necessary to provide reliable commuter service or protect the agency's investment so long as such terms and conditions do not unreasonably interfere with freight rail service. Thus, the easement or the operating agreement may restrict freight operations to specific parts of the day, provided that the window for exclusive freight operations is adequate to satisfy the service needs of freight shippers. Likewise, the public agency may assume responsibility for maintaining the line and dispatching freight operations if the operating procedures are reasonable and do not discriminate against freight service, and if the freight carrier has the right to inspect and to request prompt repair of any track defects.

Maryland Transit Administration – Petition for Declaratory Order, STB Finance Docket No. 34975, slip op. at 4-5 (Service Date Sept. 19, 2008) (internal citations omitted). *Accord*,

Wisconsin Dept. of Transp. – Petition for Declaratory Order – Rail Line in Sheboygan Cty., WI, STB Finance Docket No. 35195 (Service Date April 20, 2009) (holding that WisDOT's acquisition of physical assets comprising a rail line but not the freight easement was consistent with the transaction described in *State of Maine* and therefore did not require Board authorization under 49 U.S.C. § 10901); *Utah Transit Authority – Acquisition Exemption – Union Pacific Railroad Company*, STB Finance Docket No. 35008 (Service Date July 23, 2007) (UTA's acquisition of physical railroad line but not the freight easement did not require Board authorization because UPRR's ability to provide freight service would not be impaired).

Applying these principles, the Board has previously determined that acquisitions of rail property by NJ Transit, including the authority to maintain a line and dispatch on that line, does not warrant the exercise of Board jurisdiction because the transaction prevented NJ Transit from impairing the freight rail obligations of the rail carrier that retained the freight carriage easement. *New Jersey Transit– Acquisition Exemption – Certain Assets of Conrail*, 4 S.T.B. 512, 514 (2000). As in the earlier *New Jersey Transit* decision and the *Utah Transit Authority* decision, the Board should conclude that NJ Transit's acquisition of the Line, a 1.3-mile segment of the Orange Industrial Track, does not involve the transfer of common carrier obligations and, therefore, the Board's oversight authority does not apply.

B. General Provisions

NSR will retain a perpetual, exclusive easement to conduct rail freight operations on the Orange Industrial Track that will not terminate unless and until NSR obtains and exercises abandonment authority from the Board. See Quitclaim Deed (NOE Exhibit 4). NJ Transit has no right to use any portion of the Orange Industrial Track for freight rail operations. *Id.* NJ Transit will not hold itself out as a freight common carrier and because it will have neither the

right nor the ability to provide freight service on the Orange Industrial Track, its acquisition of the Line does not involve a transfer of any common carrier obligation and is not subject to the Board's jurisdiction. *Central Puget Sound Regional Transit Auth. – Acquisition Exemption – BNSF Railway Co.*, STB Finance Docket No. 34747, slip op. at 2 (Service Date Nov. 18, 2005).

C. Operations, Maintenance and Dispatching

As discussed above, use of the Orange Industrial Track will be governed by the 1984 Trackage Rights Agreement (excerpted at NOE Exhibit 2), which has successfully allowed for joint usage of tracks by NJ Transit and NSR (or NSR's predecessors) for freight and passenger rail service for over 25 years. Pursuant to the Second Operating Agreement for the Orange Industrial Track (NOE Exhibit 5), a portion of the Line will be classified as "Category NFP Rail Property" (shared freight and passenger use, over which NSR has retained an easement for its freight operations) under the Trackage Rights Agreement and the remainder will be classified as "Category NF Rail Property" (freight-only use for which NSR has retained an easement). Second Operating Agreement, Sec. 2 (Attached to NOE as Exhibit 5). Under the Trackage Rights Agreement, NJ Transit will therefore assume the dispatching rights and maintenance obligations for the Line but will not interfere with NSR's ability to provide freight common carrier service.

Board precedent makes clear that that the critical factor under *State of Maine* is not *who* holds the authority to dispatch and maintain the tracks, but whether the agreements specifying the terms of use of the tracks assure that freight operations will not be impaired. As the Board has explained:

Dispatching control has less importance in its own right than it has as a means of enforcing the service priorities accorded under the operating agreement. If the operating agreement considered as a whole and the circumstances surrounding it are not likely to impair freight service, the passenger operator's control over

dispatching will not by itself create such an obstacle. because the latter merely implements the former.

Los Angeles Cty. Transp. Comm'n – Petition for Exemption – Acquisition from Union Pacific R.R. Co., STB Finance Docket No. 34374, slip op. at 3 (Service Date July 23, 1996). *See also Utah Transit Authority, supra*. Similarly, a public agency's acquisition of maintenance obligations while a freight railroad continues operating on a line does not place that agency within the Board's jurisdiction. *Maryland Transit Administration*, slip op. at 4-5. As noted above, the Board has concluded that NJ Transit's acquisition of a rail line, including the authority to maintain the line and dispatch on the line, does not make the transaction subject to Board jurisdiction because the transaction includes measures to assure the movement of freight rail service. *New Jersey Transit*, 4 S.T.B. at 514.

Here, it is clear that NJ Transit's acquisition of the Line, a 1.3 mile segment of the Orange Industrial Track, will not impair NSR's ability to provide freight rail services. First, the 1984 Trackage Rights Agreement (excerpted at NOE Exhibit 2) has allowed for the successful joint use of tracks by NJ Transit, NSR and NSR's predecessors in New Jersey for over 25 years. Even though approximately 0.7 mile of the Orange Industrial Track will now be treated as "Category NFP Rail Property" under the Trackage Rights Agreement, that agreement specifically provides that NJ Transit's management, use and control of Category NFP Property, including the right to dispatch, "shall not be exercised in a manner which would unreasonably interfere with Conrail's [now NSR] Trackage Rights." Trackage Rights Agreement, Sec. 3.01. In addition, Section 3 of the Second Operating Agreement (NOE Exhibit 5) specifically provides that NSR can obtain access to the Line "at any time upon 48 hours' notice." Thus, if NSR should need the Orange Industrial Track for its freight operations, it may obtain such access upon demand. Because the parties have provided a mutually acceptable manner for NSR to utilize the

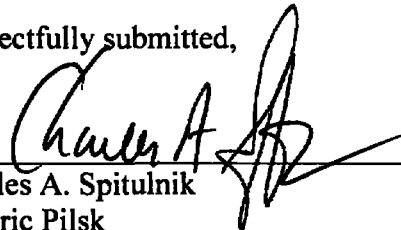
Orange Industrial Track as needed, NSR will continue to be able to provide adequate freight service to its customers. NJ Transit's control over dispatching and maintaining the Line will not interfere with NSR's freight operations.

III. CONCLUSION

Consistent with prior Board rulings, NJ Transit is acquiring sufficient interests to permit it to conduct and implement light rail operations but insufficient interests to allow it to conduct freight operations on its own or to impede NSR's ability to fulfill its common carrier obligations on the Orange Industrial Track. As a result, the Board should conclude that it does not need to authorize the transaction and should dismiss the Notice of Exemption.

WHEREFORE, and in view of all of the foregoing, NJ Transit respectfully requests that the Board dismiss NJ Transit's concurrently filed Notice of Exemption in this proceeding.

Respectfully submitted,



Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 955-5600

Counsel for the New Jersey Transit Corporation

Dated: October 1, 2012

Exhibit A

Verified Statement of M. David Gooden

[attached hereto]

**Before the
Surface Transportation Board**

Finance Docket No. 35638

**NEW JERSEY TRANSIT CORPORATION
– ACQUISITION EXEMPTION –
NORFOLK SOUTHERN RAILWAY COMPANY
IN THE COUNTY OF ESSEX, NEW JERSEY**

**VERIFIED STATEMENT OF M. DAVID GOODEN,
NORFOLK SOUTHERN RAILWAY COMPANY**

1. I am M. David Gooden, Division Superintendent, Harrisburg Division, at Norfolk Southern Railway Company ("NSR"). I have been employed with NSR since 8/16/97, and have served in various capacities within the company.
2. I have overall supervision of the line segments that are relevant to this proceeding, including the Second Operating Agreement that will govern the operation of NSR trains over the Orange Industrial Track, attached as Exhibit 5 to the Notice of Exemption of New Jersey Transit ("NJT") in this proceeding. The Second Operating Agreement for the Orange Industrial Track preserves NSR's existing freight operations without interference from NJT's use of a portion of the track upon terms that are acceptable to NSR.
3. NSR will retain an exclusive, perpetual and irrevocable easement permitting it to exercise its existing rail freight rights and obligations over the Orange Industrial Track between Milepost 8.616 and Milepost 9.905. The Second Operating Agreement will remain in effect until NSR formally abandons its common carrier rights and obligations over the Orange Industrial Track.

4. Since 2001, NJ TRANSIT has operated light rail service between Milepost 9.156 and Milepost 9.839 and utilizes such property to access its maintenance yard facilities. The Second Operating Agreement permits NJT to have access to the Orange Industrial Track for the purpose of performing the NJT rail operations, maintaining solely passenger facilities, and securing NJT's property and equipment.
5. NSR operates its road and local freight trains, as well as emergency trains, special trains, locomotives, switching movements, and other on-track equipment on the Orange Industrial Track. Pursuant to the Second Operating Agreement, NSR shall have the right to access and use the Orange Industrial Track at any time upon 48 hours notice to NJT.
6. NSR has not used the Orange Industrial Track since March, 2009.

DATED this 27th day of Sept, 2012



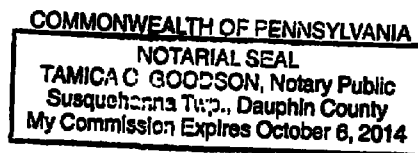
M. David Gooden
Division Superintendent,
Harrisburg Division, Norfolk Southern
Railway Company

SUBSCRIBED AND SWORN to before me this 27th day of Sept., 2012.

My commission expires October 6, 2014.



Notary Public : Tamica C Goodson

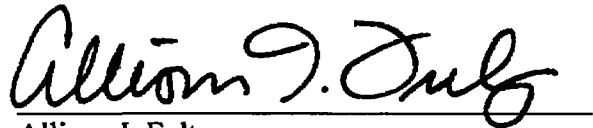


Certificate of Service

I hereby certify that I have this day caused a copy of the foregoing Motion to Dismiss of the New Jersey Transit Corporation to be served by first class mail, properly addressed and with postage prepaid, upon the following parties of record to this proceeding:

Malcolm G. Roop
Norfolk Southern Railway Company
1200 Peachtree Street, N. E.
Atlanta, Georgia 30309

Greg E. Summy
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510


Allison I. Fultz

Dated: October 1, 2012